PP v. NGUMBANG ABANG & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
CHE MOHD RUZIMA GHAZALI JCA
AZMI ARIFFIN JCA
[CRIMINAL APPEAL NOS: Q-05(LB)-350-09-2020
& Q-05(LB)-351-09-2020]
13 JUNE 2024

Abstract – *(i) Accused persons in a murder case do not have the right to a plea of self-defence if it is shown, inter alia, that the accused persons could have run away and have time or opportunity to have recourse to the protection of the public authorities but did not do so and that the accused persons have inflicted more harm than it is necessary on the victim, thus exceeding their right of private defence. The right of private defence continues as long as such apprehension of danger to the body continues. However, when there is no risk of death, it is unjustified for the accused persons to inflict death on the deceased in guise of the private defence; (ii) There is no miscarriage of justice that would result from a technically incorrect date of the offence in a charge due to a clerical error. Even if the prosecution failed to make an application to amend the charge, the error is curable under s. 422 of the Criminal Procedure Code.*

CRIMINAL LAW: *Murder – Penal Code, s. 302 – Plea of self-defence – Whether pre-condition under s. 99(3) of Penal Code fulfilled – Whether there was time for accused persons to have recourse to protection of public authorities – Whether force used by accused persons should not extend to inflicting more harm than necessary – Whether there was failure to satisfy condition set out in s. 99(4) of Penal Code – Whether apprehension of danger of bodily injury to accused persons subsided or ceased its existence – Whether accused persons could rely on right of private defence based on condition set out under s. 102 of Penal Code – Whether accused persons acted beyond parameter of right of private defence*

CRIMINAL PROCEDURE: *Charge – Frame of charge – Whether properly framed – Absence of written amendment made as to actual date of fateful incident in charge – Whether rendered charge defective – Whether accused persons misled or prejudiced by failure of prosecution to make necessary written amendment to actual date in charge – Whether there was miscarriage of justice resulting from technically incorrect date of offence in charge due to clerical error – Whether error curable under s. 422 of Criminal Procedure Code*

The first respondent/first accused ('R1') and the second respondent/second accused ('R2') were charged for an offence of murder in the High Court under s. 302 of the Penal Code. On 18 March 2017, at about 10.35am, a corpse was found facing downwards on the ground at a palm oil plantation. The

A body had decomposed without a right foot sole, and there were tattoos on the left thigh and the left shoulder. The deceased was later identified. Based on the post-mortem examination, the cause of death of the deceased was determined to be scrotal injury due to sharp force trauma. Seven suspects were arrested, and after investigations, R1 and R2 were charged with murder, committed in furtherance of their common intention towards the deceased. Eyewitnesses testified that R1 had stabbed the deceased while R2 held him from behind, and that R2 had cut the deceased's right foot. At the end of the prosecution's case, the High Court Judge ('HCJ') called upon R1 and R2 to enter their defences. The crux of R1 and R2's defence was that they were acting in self-defence, and as such they could not have any intention to cause the injuries that, in the ordinary course of nature, would cause death to the deceased. In his testimony, R1 told the court that during a heated argument he had with the deceased, the latter had punched him first because of the unfair distribution of chilli. During the fight, the deceased drew out his parang and tried to slash him. R1 claimed he felt scared and then had used a knife to stab the deceased. At the time when the deceased tried to slash R1, R2 held the deceased. R2 gave a similar testimony and claimed he had to intervene by restraining the deceased and seizing the parang. R1 and R2 asserted that they had not intended to kill the deceased. The HCJ accepted the testimonies of the defence over that of the prosecution witnesses and held that R1 and R2 had succeeded, on the balance of probabilities, in proving their defence of self-defence. Besides that, there was no amendment made to the date of the commission of the offence. Therefore, there was grave doubt as to the date of the offence if based on the original charge *ie*, the offence was allegedly committed on 19 March 2019 but the facts and evidence showed that it was committed on 15 March 2019. In light of the findings, the HCJ had acquitted and discharged R1 and R2 of the offence preferred against them. Aggrieved, the prosecution appealed. The issues that arose were: (i) whether the respondents were entitled to a plea of self-defence; and (ii) whether the charge preferred against the respondents was defective since there was no amendment made by the prosecution to rectify the date of the fateful incident.

Held (allowing prosecution's appeal)
Per Che Mohd Ruzima Ghazali JCA delivering the judgment of the court:

(1) The evidence and testimonies of the eyewitnesses on how the fateful incident had happened, coupled with the expert evidence by PW8, who did the autopsy on the deceased, this court was satisfied that there was sufficient evidence to conclude that R1 with the help of R2 had the intention to cause bodily injury to the deceased and the bodily injury was sufficient in the ordinary course of nature to cause the death of the deceased. Thus, the prosecution had established all the elements that needed to be proved for the offence of murder as required under s. 300(c) of the Penal Code ('PC'). Also, the facts revealed out of the

evidence established by the prosecution, taken together as a whole, would lead to the one and only inference that R1 and R2 had committed the offence in furtherance of their common intention. (paras 22 & 23)

(2) In order to find out whether the right of private defence was available in favour of the respondents, this court would have to analyse and determine the compliance of the pre-conditions and the conditions as stipulated under the law. The respondents had shown that an offence affecting the human body was being committed by the deceased against R1 when the deceased took out his parang from the sheath to slash R1 during the fight. The set of circumstances that had taken place justified the first pre-condition as required under s. 97(a) of the PC. For the third pre-condition, the respondents passed the justification required under s. 100(a) of the PC, that was, to show that the action taken by the deceased may reasonably cause the apprehension that death would otherwise be the consequence of such action. Again, the deceased's action in taking out his parang from the sheath to slash R1 during the fight, reasonably justified the apprehension of death to the respondents. (para 38)

(3) As for the second-precondition, s. 99(3) of the PC requires that if there is time to have recourse to the protection of the public authorities, the right of private defence does not bite. Based on the established facts from the evidence adduced, it showed that when the deceased took out his parang from the sheath tied up on his waist, R2 who was standing behind the deceased managed to seize hold of the parang and at the same time he managed to hold the deceased from behind. In such a situation, the parang was no longer in the possession of the deceased and R1 or even R2, could run away and have time or opportunity to have recourse to the protection of the public authorities or at least try to get help from the residents living not far from the crime scene. The respondents failed to fulfil the said pre-condition under s. 99(3) of the PC. (para 39)

(4) As to the conditions to be fulfilled by the respondents in order to succeed in raising private defence, for the first condition, s. 99(4) of the PC stipulates that the force used in the exercise of private defence should not extend to the inflicting of more harm than it is necessary. It was an undisputed fact that when R1 stabbed the deceased using a knife, R2 had already seized the parang from the deceased. Furthermore, R2 managed to hold the deceased from behind. It meant that, at the time R1 stabbed the deceased, it was impossible for the deceased to inflict any bodily injury to R1 and R2 using the parang since the parang was no longer in the deceased's possession. Upon successfully retrieving the parang from the deceased, there was no need for R1 to inflict injury by stabbing the deceased repeatedly. Certainly, in such situation, R1 with the help of R2, inflicted more harm than it was necessary on the deceased. The

respondents had exceeded their right of private defence. Thus, the respondents failed to satisfy the condition set out in s. 99(4) of the PC. (para 40)

(5) The second condition stipulated under s. 102 of the PC is that, the right to private defence continues as long as such apprehension of danger to the body continues. Again, the undisputed facts that showed R1 stabbed the deceased after R2 had seized the parang from the deceased, and at the same time R2 had held the deceased from behind, were pertinent. In light of those facts, it was obvious that such apprehension of danger of bodily injury to R1 and R2 had subsided or ceased its existence. By stabbing the deceased when there was no longer such apprehension of danger to the body, clearly R1 with the help of R2, had acted beyond the parameter of the right of private defence. When there is no risk of death, it is unjustified for the respondents to inflict death on the deceased in guise of the private defence. Therefore, the respondents could not rely on the right of private defence based on the condition set under s. 102 of the PC. On a balance of probabilities, the respondents failed to show that they have the right to rely on the right of private defence. Therefore, the first issue was answered in the negative. (paras 41 & 42)

(6) The HCJ had allowed the oral application by the prosecution to amend the date of the offence in the charge preferred against the respondents and there was no objection by the respondents. From thereon, the prosecution's case proceeded based on the fact that the alleged offence was committed on 15 March 2017. Then, at the defence stage, the way in which the defence was presented, made it obvious that they duly acknowledged the actual date of the alleged offence, and the nature of the prosecution's case. The respondents were well aware of the actual date of the alleged offence and not an iota of evidence showed otherwise. Thus, the respondents were in no way misled or prejudiced by the failure of the prosecution to make the necessary written amendment to the actual date in the charge. There was no miscarriage of justice that would result from a technically incorrect date of the offence in the charge due to the clerical error. The charge preferred against the respondents was not defective. Even if the prosecution failed to make an application to amend the charge, the error was curable under s. 422 of the Criminal Procedure Code. Thus, the second issue was answered in the negative (paras 51-53)

(7) There were merits in the prosecution's appeals. The prosecution had proved the case beyond reasonable doubt against the respondents on the charge of murder under s. 302 of the PC. The High Court's acquittal order was therefore quashed. Both R1 and R2 were convicted of murder under s. 302 of the PC. This court imposed imprisonment of 30 years from the date of sentencing and whipping of 12 strokes of rattan on each of the respondents. (paras 54 & 55)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Darshan Singh v. State Of Punjab & Anor [2010] (2) SCC 333 ***(refd)***
Lee Thian Beng v. PP [1971] CLJU 61; [1971] 1 LNS 61 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Msimanga Lesaly v. PP [2005] 1 CLJ 398 CA ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
Patrick Chau Fook Henn v. PP [2014] 8 CLJ 14 CA ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor And Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 152, 153(1), 154, 156, 173(f), 180, 422
Penal Code, ss. 96, 97(a), 98, 99(1), (2), (3), (4), 100(a), 101, 102, 103, 104, 105, 106, 302

For the appellant - Mohd Fairuz Johari; DPP
For the respondents - Harold Emparak Kerebo; M/s Gapor & Co Advocs

[Editor's note: Appeal from High Court, Sibu; Criminal Appeal No: SBW-45B-1-1-2018 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Che Mohd Ruzima Ghazali JCA:

Introduction

[1] Both respondents, Udi anak Ambo (first respondent/first accused) and Ngumbang anak Abang (second respondent/second accused), were charged for an offence of murder in the High Court of Sibu and the charge against them read as follows:

> That you together, on 19th March 2017, between 12.20 a.m. and 3.30 a.m. at chili farm, Ulu Sungai Enseluai Sare, 96100 Sarikei, in the District of Sarikei, in the State of Sarawak, in furtherance of the common intention of you all, did commit murder by causing the death of Jampong Anak Jon (NRIC: 650807-13-5913), and you thereby committed an offence punishable under section 302 of the Penal Code, and read together with section 34 of the same Code.

[2] At the end of the prosecution's case, the learned High Court Judge (LHCJ) made a finding that the prosecution had successfully proved a *prima facie* case against the respondents and called on them to enter their defence. At the end of the defence's case, the LHCJ decided that both respondents had

successfully raised reasonable doubts and thus, both respondents were acquitted and discharged. Aggrieved with the said decision, the Public Prosecutor (the appellant) appealed.

[3] The appellant's appeal against the first respondent/first accused was registered as No. Q-05(LB)-351-09-2020 and the appeal against the second respondent/second accused was registered as No. Q-05(LB)-350-09-2020. Before us, both appeals were heard together.

[4] For ease of reference, parties will be referred to as follows, the first respondent/first accused as R1, the second respondent/second accused as R2, both R1 and R2 are respondents and the appellant as PP.

Prosecution's Case

[5] On 18 March 2017, at about 10.35am, Cpl RF/136370 Suraya binti Sarakal (PW2), who was on duty at the enquiry office, Central Police Station, Sarikei, received a phone call from Ting Shu Shien (PW9), who found a corpse facing downwards on the ground at his palm oil plantation site located at Sare. PW2 then lodged the police first information report bearing No. Sarikei/000880/17 (exh. P15) and PW9 also lodged a police report on the same day, *vide* Police Report No. Sarikei/000881/17 (exh. P63).

[6] On the same day at about 11.20am, Inspector G 22179 Lim Tzer Feng (PW4), who was the officer on duty, together with his team, went to the crime scene in a palm oil plantation at Ulu Sungai Enseluai, Sare, Sarikei. Upon inspection at the crime scene, PW4 and his team found a dead body that had decomposed without a right foot sole, and there were tattoos on the left thigh and the left shoulder. The deceased was later identified as Jimpong anak Jon (the deceased) by his son, Jacky Majit anak Jimpong.

[7] The post-mortem on the deceased was conducted by Dr Norliza Ibrahim (PW8) on 21 March 2017. Based on the post-mortem examination, the cause of death of the deceased was determined to be scrotal injury (due to) sharp force trauma.

[8] The investigation officer, Inspector G 19727 Anbarasu a/l Gobi (PW3), who is the investigation officer, arrested seven suspects, including the victim's brother, Ali anak Jon. After the investigation, R1 and R2 were charged with murder, committed in furtherance of their common intention towards the deceased.

[9] Eyewitnesses, Benid anak Igat (PW14) and Narawie Manggie (PW15), testified that R1 stabbed the deceased while R2 held him from behind. They also stated that R2 later cut the deceased's right foot.

The LHCJ's Decision At The End Of The Prosecution Case

[10] At the end of the prosecution case, the LHCJ reminded himself of his duty as laid out in s. 180 and s. 173(f) of the Criminal Procedure Code. For the *prima facie* case and the maximum evaluation test, the LHCJ refer to the High Court decision in *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1 and *PP v. Ong Cheng Heong* [1998] 4 CLJ 209; [1998] 6 MLJ 678, Court of Appeal decision in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 AMR 89 and *Balachandran v. PP* [2005] 1 CLJ 85, and Federal Court decision in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203.

[11] After subjecting the evidences and testimonies of the witnesses for the prosecution to maximum evaluation and having the well-established principles of law in determining whether a *prima facie* case has been made out in the forefront of the mind, the LHCJ held that the PP had succeeded in making out a *prima facie* case against R1 and R2. Consequently, the LHCJ called upon them to enter their defences. The three alternatives of giving evidence on a sworn oath, making a statement from the dock, and electing to remain silent were duly explained to R1 and R2. Both accused elected to give sworn evidence on oath from the witness stand.

R1 And R2 Defences

[12] The crux of R1 and R2's defence is that they were acting in self-defence, and as such they could not have any intention to cause the injuries that, in the ordinary course of nature, would cause the death of the deceased.

[13] In his testimony, R1 told the court that he was involved in a fight between him and the deceased during the night but could not remember the date. According to R1, during the heated argument, the deceased punched him first because of the unfair distribution of chilli. During the fight, the deceased drew out his parang and tried to slash him. He felt scared and moved aside. He then used a knife and stabbed the deceased. As R1 was scared, he could not remember how many times he stabbed the deceased. At the time when the deceased tried to slash R1, R2 held the deceased. R1 stabbed the deceased with a knife only because the deceased had tried to slash him with a parang, and he did not intend to kill him.

[14] R2 gave a similar testimony, stating that on the night in question, he went to the chilli farm with R14, R15, Ali, Madi, Enggie, R1, and the deceased. An argument over the distribution of chilli led to the deceased attempting to slash R1 with a parang. R1 tried to defend himself, and R2 had to intervene by restraining the deceased and seizing the parang. The deceased kicked the parang held by R2, who continued to hold the deceased to help R1. R2 asserted that neither he nor R1 intended to kill the deceased. During the proceedings, R2 claimed that he did not understand the prosecution's questions.

A **The LHCJ's Decision At The End Of The Defence Case**

[15] Having considered the testimonies of R1 and R2, re-evaluated the testimonies of the prosecution's witnesses, the various exhibits tendered, and the written submissions of the parties at the end of the defence case, the LHCJ prefers and accepts the testimonies of the defence over that of the
B prosecution witnesses and find that R1 and R2 are simple-minded and credible witnesses. R1 and R2 have succeeded on the balance of probabilities in proving their defence of self-defence. Besides that, there was no amendment made to the date of the commission of the offence. Therefore, there is grave doubt as to the date of the offence if based on the original
C charge, *ie*, the offence was allegedly committed on 19 March 2019 but the facts and evidence showed that it was committed on 15 March 2017. In light of the findings, the LHCJ had acquitted and discharged R1 and R2 of the offence preferred against them.

The Appeal

D

[16] Aggrieved by the LHCJ's decision, the PP appealed, listing ten reasons in the petition of appeal filed on 11 December 2020. In the submission before us, the Deputy Public Prosecutor (DPP) summarised these reasons into three main issues:

E (i) whether the LHCJ had erred in law and facts when His Lordship had decided that the R1 and R2 had successfully on the balance of probabilities raised the defence of private defence as provided by s. 96 of the Penal Code;

F (ii) whether the LHCJ had erred in law and in facts when His Lordship had decided that both the respondents were not acting in furtherance of a common intention to murder the deceased when the evidences of common intention were overwhelming; and

G (iii) whether the LHCJ had erred in law and in facts when His Lordship had failed to thoroughly analyse the whole facts of the case to come to the conclusion that the R1 and R2 had extended to inflict more harm than it was necessary to inflict on the deceased for the purpose of defence as there were four stab wounds at the material parts of the body of the deceased.

H **[17]** Learned DPP argued that both respondents had failed to successfully raise the defence of self-defence under s. 96 of the Penal Code. The evidence from the eyewitnesses clearly shows that as the deceased was trying to draw his parang tied around his waist, R2 was able to immediately stop him, and seize the parang. At that moment, the apprehension of death or grievous hurt
I to R1 or R2 no longer exists. R2 was able to neutralise the deceased by holding him from the back and then, R1 stabbed the deceased four times with the help of R2. As both respondents were not under the apprehension of

death or grievous hurt from the deceased, their defence of self-defence must fail, as their act of stabbing the deceased repeatedly was a harm inflicted more than necessary. It was further submitted that both respondents were acting in furtherance of a common intention to commit murder on the deceased based on the overwhelming evidence as adduced during the trial.

[18] *Per contra*, learned counsel for the respondents submitted that the LHCJ did not commit any error of law or fact in his decision. Upon perusing the evidence and testimonies adduced by the defence, and after careful assessment of the demeanour and credibility of the respondents, the LHCJ found that they were simple-minded and credible witnesses. Having had the visual advantage of observing the demeanour of the respondents throughout the trial, learned counsel for the respondents submits that the trial judge had made a correct observation. Besides that, the LHCJ was correct when he stated that the charge preferred against the R1 and R2 was defective. Evidence from the witnesses clearly shows that the fateful incident occurred in the early morning of 15 March 2017 and not on 19 March 2017 as stated in the charge, consent to the charge and the DPP's opening speech.

Our Findings

[19] In light of the arguments put forward by both parties, we find that there are two main issues that require determination in this appeal. The first issue is whether the respondents are entitled to a plea of self-defence and the second issue is whether the charge preferred against the respondents is defective since there is no amendment made by the prosecution to rectify the date of the fateful incident.

[20] Before we address the issue related to the right to self-defence forwarded by the respondents in their defence, it is pertinent to examine the evidence adduced in the prosecution's case. The evidence from the two eyewitnesses called by the prosecution, PW14 and PW15, shows that the fateful incident did occur out of a fight between R1 and the deceased early in the morning on 15 March 2017. The only reason for the said fight is that there was an unfair distribution of chilli among them. Even though the deceased intended to use his parang during the fight, the uncontradicted evidence testified by the eyewitnesses shows that R2 was able to seize the parang from the deceased and then R1 stabbed the deceased while R2 held the deceased from behind. That fact remained unrebutted throughout the prosecution case. Further, according to PW14, R2 asked or instructed R1 to stab the deceased while he held the deceased from behind. The knife, exh. P25(A), used by R1 to stab the deceased in the fateful incident, was positively identified by PW14 and PW15.

[21] Meanwhile, PW8, who did the autopsy on the deceased, confirmed that the cause of death was scrotal injury (due to) sharp force trauma. In her testimony, PW8 informed the court that an external and internal examination revealed that the deceased suffered four external marks of

injuries and all the injuries were due to sharp force trauma. One of the traumas was an incision, while the rest were stab wounds. The stab wounds were consistent with being caused by sharp and pointed object such as a knife or any other similar object. The stab wound No. 4 caused injury to the left scrotal, which subsequently led to hematoma inside the left scrotal sac as there were abundant of blood vessels in that area. PW8 is of the opinion that the injury No. 4 that caused the death of the deceased, and the deceased did not suffer any disease that could cause or contribute to his death.

[22] Having examined the present appeal in light of the evidence on record, we are satisfied that the evidence and testimonies of the eyewitnesses on how the fateful incident had happened, coupled with the expert evidence led by PW8 on the injury suffered by the deceased, are sufficient enough to conclude that R1, with the help of R2, had the intention to cause bodily injury to the deceased and the bodily injury is sufficient in the ordinary course of nature to cause the death of the deceased. Thus, the prosecution had established all elements that needed to be proved for the offence of murder as required under para. 300(c) of the Penal Code (PC), which provide as follows:

> **Murder**
>
> 300. Except in the cases hereinafter excepted, culpable homicide is murder:
>
> …
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> …

[23] We are also satisfied that the facts revealed out of the evidence established by the prosecution, taken together as a whole, would lead to one and only inference that R1 and R2 had committed the offence in furtherance of their common intention. In *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17; [2010] 1 MLJ 749 at p. 35 (CLJ); p. 764 (MLJ), the Federal Court formed the following opinion:

> It is a well established principle of law in dealing with the criminal liability under s. 34 of the Penal Code that a pre-concert or preplanning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case, it may be proved as a matter of inference from the circumstances of the case (see the cases of *Mahbub Sha v. Emperor* AIR 1945 PC 178 and *Suresh v. State of Uttar Pradesh* AIR 2001 SC 1344. …

See also the Federal Court decision in *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241; [1987] 2 MLJ 336 where at pp. 251 and 252 (CLJ); pp. 344 and 345 (MLJ) Syed Agil Barakbah SCJ opined:

> In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.
>
> Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (The Supreme Court (of India) on Criminal Law 1950-1960 by J.K. Soonavala page 188 to 193).

From the unrebutted facts adduced by the prosecution as earlier mentioned in para. [20] above, it clearly shows that R1 and R2 had committed the offence in furtherance of their common intention.

[24] Therefore, we reiterate that the LHCJ was correct in calling the respondents to enter on their defence to answer the charge of murder on the *prima facie* level. The applicable test that is in play at the end of the prosecution case as enunciated in the cases referred to by the LHCJ as mentioned in para. [10] above had been fulfilled. We agreed with the LHCJ that, on the evidence as it stood at the end of the prosecution case, if the respondents were to elect to remain silent at the defence stage, such evidence led by the prosecution is strong enough to have a conviction entered against the respondents. Thus, it is safe for us to affirm the LHCJ's decision to call R1 and R2 to enter their defence on the murder charge at the *prima facie* stage.

First Issue: Whether The Respondents Are Entitled To A Plea Of Self-defence

[25] The law on private or self-defence is trite. Section 96 of the PC would absolve one of any wrongdoing if it was done in the exercise of the right of private defence. In other words, it recognises such an act as a complete statutory defence. The general provision on private defence stated in s. 96 of the PC is as follows:

> **Nothing done in private defence is an offence**
>
> 96. Nothing is an offence which is done in the exercise of the right of private defence.

The right of private defence extended to an act to guard or protect oneself, a third party, or property against imminent harm, or a threat of harm, by another person as provided under s. 97 of the PC as follows:

Right of private defence of the body and of property

97. Every person has a right, subject to the restrictions contained in section 99, to defend:

(a) his own body, and the body of any other person, against any offence affecting the human body;

(b) the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

As clearly stated in the above provision, such right is subjected to certain restriction as contained in s. 99 of the PC. The restrictions are as follows:

Acts against which there is no right of private defence

99 (1) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

(2) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

(3) There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

(4) The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

A right of private defence to protect oneself can even be extended to the voluntary causing of death or of any other harm to the assailant as provided under s. 100 of the PC as follows:

When the right of private defence of the body extends to causing death

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is of any of the following descriptions:

(a) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

(b) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

(c) an assault with the intention of committing rape;

(d) an assault with the intention of gratifying unnatural lust;

(e) an assault with the intention of kidnapping or abducting;

(f) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

The scope and width of exercising the right of private defence of oneself is succinctly stated in s. 102 of the PC as follows:

Commencement and continuance of the right of private defence of the body

102. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

[26] From the above provisions of the law on private defence, it is clear that there are pre-conditions and conditions to be fulfilled in order to succeed in the plea of private defence involving voluntary causing of death to the assailant. First, para. 97(a) of the PC sets a pre-condition that the right of private defence only arises when an offence affecting the human body is being committed against oneself or any other person. Second, sub-ss. 99(1), (2) and (3) of the PC clearly set a pre-condition when it begin with the wording "There is no right of private defence" followed by the relevant act of which does not qualify the defence of private defence. In relation to the facts of this appeal, sub-s. 99(3) sets a pre-condition that when there is time to have recourse to the protection of the public authorities, the private defence is not available. It is clear that the opening wordings used in sub-s. 99(3) imposed a pre-condition in which an objective inquiry had to be undertaken to determine whether the action taken could amount to the exercise of the right of the private defence. Third, para. 100(a) of the PC sets a pre-condition that such an assault by the assailant may reasonably cause the apprehension that death will otherwise be the consequence of such assault.

[27] In the course of exercising the right of the private defence, the law stipulated the conditions which described the parameters and the terms of the extension of the right. First, sub-s. 99(4) of the PC sets a condition that the right of private defence does not extend to the inflicting of more harm than is necessary for the purpose of defence. This provision clearly envisages a case that where the right of private defence exists, there is a perimeter within which the defence must operate. Second, as a continuation of the pre-condition as provided under para. 100(a) of the PC, s. 102 of the PC provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises and it continues as long as such apprehension of danger to the body continues to exist. Looking at it from a different angle, this condition means that if such apprehension of danger to the body of oneself or any other third person had subsided or ceases its existence, the right of private defence is no longer available.

[28] To illustrate the justification in exercising the right of private defence, we refer to our decision in *Patrick Chau Fook Henn v. PP* [2014] 8 CLJ 14; [2014] 3 MLJ 825 (*Patrick Chau Fook Henn*'s case), where Abdul Aziz Abd Rahim JCA, who was delivering the judgment of the court made the following observation and opinion:

> [36] In *Public Prosecutor v. Ngoi Ming Sean* [1982] 1 MLJ 24, it was said that the right of private defence commences as soon as there is apprehension of danger to the body and this right continues so long as such apprehension of dangers continues. And, it goes without saying that the right of private defence ceases and is not available when there is no more apprehension of danger to the body. In assessing whether a private defence had been successfully pleaded by an accused, the court must consider the manner in which force was used by the accused in defending himself from attack. This is because in law the use of force is allowed only when it is absolutely necessary in self-defence: See *Lee Thian Beng v. Public Prosecutor* [1972] 1 MLJ 248, where the court had said that '… it is clearly the law, with regard to the use of force in self-defence, that there must be no alternative to its recourse.' It is also in our view that though the law does not require an accused to run away when he is being attacked, there is an obligation on the part of the accused to make an effort in any reasonable manner to get himself out of danger from the attack. The justification for use of force in retaliation is available in our view only in situations where the accused was cornered and there is no possible way of escaping from the attack except to retaliate by using whatever necessary force that is required for the purpose of self-defence. In this instant case, that is on appeal before us, the fact shows that the deceased has altogether 15 injuries, six of which are stab wounds and one of the stab wounds is fatal because it pierced the heart of the deceased and caused massive haemorrhage resulting in death. Beside the stab wounds, the deceased had also sustained four incised wounds.

[29] On the right of private defence, we further refer to the decision of the Supreme Court of India in the case of *Darshan Singh v. State Of Punjab & Anor* AIR 2010 Supreme Court 1212; 2010 (2) SCC 333, which made the following observation:

> 31. Right of private defence of person and property is recognized in all free, civilised, democratic societies within certain reasonable limits. Those limits are dictated by two considerations: (1) that the same right is claimed by all other members of the society and (2) that it is the State which generally undertakes the responsibility for the maintenance of law and order. The citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrong done to them or to punish the wrong doer of commission of offences.
>
> 32. A legal philosopher Michael Gorr in his article *"Private Defence"* (published in the Journal "Law and Philosophy" Volume 9, Number 3/August 1990 at Page 241) observed as under:

> Extreme pacifists aside, virtually everyone agrees that it is sometimes morally permissible to engage in what Glanville Willams has termed "private defence", *ie*, to inflict serious (even lethal) harm upon another person in order to protect oneself or some innocent third party from suffering the same.
>
> 33. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self-creation. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose.
>
> 34. This court in number of cases have laid down that when a person is exercising his right of private defence, it is not possible to weigh the force with which the right is exercised. The principle is common to all civilized jurisprudence. In *Robert B. Brown v. United States of America* (1921) 256 US 335, it is observed that a person in fear of his life in not expected to modulate his defence step by step or tier by tier. Justice Holmes in the aforementioned case aptly observed "detached reflection cannot be demanded in the presence of an uplifted knife".
>
> 35. According to Section 99 of the Indian Penal Code the injury which is inflicted by the person exercising the right should commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right every reasonable allowance should be made for the *bona fide* defender. The courts in one voice have said that it would be wholly unrealistic to expect of a person under assault to modulate his defence step by step according to attack.
>
> 36. The courts have always consistently held that the right of private defence extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of section 100 of the IPC. According to the combined effect of two clauses of section 100 IPC taking the life of the assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. A person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. …

[30] As to the scope and limitation to use of force in exercising the right of private defence, the Federal Court in *Lee Thian Beng v. PP* [1971] CLJU 61; [1971] 1 LNS 61; [1972] 1 MLJ 248 made the following observation:

Turning to the plea of private defence, section 99 of the Penal Code provides that the right of private defence in no case extends to the infliction of more harm than is necessary to inflict for the purpose of defence. Subject thereto, section 100 provides that the right of private defence extends to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault. Section 102 provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence; and it continues as long as such apprehension of danger to the body continues. The plea of private defence is one of the general exceptions set out in Chapter IV of the Penal Code, proof of which by virtue of section 105 of the Evidence Ordinance, rests on the accused. In a few words the principles to be applied in this case have been set out as above.

…

In the second place, it is clearly the law, with regard to the use of force in self-defence, that there must be no alternative to its recourse. As Lord Morris of Borth-y-Gest said recently in *Palmer v. The Queen* [1971] 2 WLR 831 839:

> An issue of self-defence may of course arise in a range and variety of cases and circumstances where no death has resulted. The tests as to its rejection or its validity will be just the same as in a case where death has resulted. In its simplest form the question that arises is the question: Was the defendant acting in necessary self-defence?

At page 843 his Lordship went on:

> In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert

> the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes it raising possible, will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider, in agreement with the approach in the *De-Freitas* case [1960] 2 WIR 523, that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case.
>
> That was a decision of the Privy Council which the Court of Appeal in England has unhesitatingly accepted in *Reg v. McInnes* [1971] 1 WLR 1600 1608.

[31] Back to the PP's appeals before us, the evidence adduced by the prosecution and later admitted by the respondents in their defence clearly shows the fact that R1 and R2 were at the crime scene when R1 was involved in a fight with the deceased over the distribution of chilli. At the prosecution case, PW14 and PW15, who were the eyewitnesses of the fateful incident, had clearly established the fact that during the fight, the deceased took out his parang from the sheath, which was tied around his waist and tried to use it against R1. In the witnesses' words, the deceased try to slash R1 with the parang after a long fight involving throwing of punches between them. However, the deceased intention to use the parang against R1 halted when R2, who was standing behind the deceased, eventually seized the parang and at the same time, held the deceased from behind. Then, R1 took out a knife exh. P25A from his left pocket and stabbed the deceased a few times. According to the testimony of PW14, R2 had asked or instructed R1 to stab the deceased while he was holding the deceased from behind.

[32] Most of the facts which were narrated by the eyewitnesses were actually not disputed by the respondents. Learned counsels for R1 and R2 at the trial who were, for sure having being instructed by the respondents,

puts the specific questions regarding the fateful incident in the cross-examination of PW14 and PW15, the eyewitnesses. In cross-examining PW14, learned counsel for R1 put the following question:

Q661 Following which Jampong, the deceased punched the 1st Accused and the 1st Accused fight back, correct?

A Yes.

Q662 From then on, they both exchanged punches until Udi used the knife Exhibit P25(A)?

A Yes.

…

Q664 Am I correct to say that that parang in actual fact belongs to Jampong?

A Yes.

Q665 Jampong was having that parang with him during the fist fight with Udi, correct?

A Yes.

Q666 After exchanging punches with Udi for a time, Jampong tried to use the parang to slash Udi, correct?

A Yes.

Q667 Seeing this the 2nd Accused caught hold of the parang and the 1st Accused at that point in time also took out his knife in his self-defence, correct?

A Yes.

Meanwhile, learned counsel for R2 put the following question to PW14:

Q669 Do you agree with me that in the heat of the argument, the deceased Jampong took out the parang which was tied around his waist and he tried to use the parang to slash or to hit at the 1st Accused?

A Yes.

Q670 At that material time, the 2nd Accused who was standing behind the deceased Jampong and saw the action of the deceased and he quickly caught hold of the deceased from behind in order to prevent the deceased from using the parang to hit at the 1st Accused, do you agree?

A Yes.

Q671 Do you agree with me that the deceased who was there holding a parang Exhibit P41(B) was prevented by the 2nd Accused who eventually seized the parang from the deceased?

A Yes.

Q672 After the 2nd Accused seized the parang from the deceased Jampong, the deceased then turned around and lifting his leg and tried to kick the 2nd Accused, do you agree?

A I agree.

Q673 Instinctive reaction by the 2nd Accused was swing the parang which he was holding and accidentally hit the ankle of the deceased, do you agree?

A Yes.

[33] As for PW15, the questions that were put by learned counsel for R1 during the cross-examination are as follows:

Q749 After having a fist fight for a period of time, Jampong took his parang which you have identified as Exhibit P41(B) and tried to slash the 1st Accused. correct?

A Yes.

Q750 Upon seeing this, the 1st Accused took out his knife in self-defence, do you agree?

A Yes.

Q751 And at that time, he simply stabbed to defence himself, am I correct to say so?

A Yes.

Q752 But for the fact that the 2nd Accused managed to caught hold of the Jampong's parang, he would have eventually managed to use it to cause harm to the 1st Accused, correct?

A Yes.

Subsequently, learned counsel for R2 put the following question to PW15:

Q755 The 2nd Accused was standing behind Jampong when the argument took place between the 1st Accused and Jampong, do you agree?

A Yes.

Q756 The 2nd Accused held Jampong when he saw Jampong trying to draw the parang which was in his possession, agree?

A I agree.

Q757 Then the 2nd Accused managed to seize the parang from Jampong, agree?

A I agree.

Q758 And thereafter Jampong seeing that his parang was seized by the 2nd Accused, he turned around and tried to kick the 2nd Accused, agree?

A I agree.

Q759 Instinctive reaction from the 2nd Accused, he then swings the parang which was held in his hand but accidentally hit the ankle of Jampong, agree?

A Yes.

B

[34] From the question put by learned counsels for the respondents to the eyewitnesses, clearly shows that R1 and R2 themselves admitted that R1 was involved in the scuffle with the deceased and later did stabs the deceased in the fateful incident. R2 also admitted that he managed to seize the parang from the deceased and held the deceased from behind thereon. In light of the C line of questioning of the eyewitnesses, it is clear that the respondents had laid down their intention to rely on the defence of private defence and they had in fact, properly notified their intention on such reliance at the prosecution case.

D **[35]** Even in his defence, R1 did not dispute that he was involved in the fight with the deceased on the early morning of 15 March 2017, where the deceased had tried to slash him with a parang and he was scared, and decided to move aside. However, he did not know and cannot remember what happened afterwards after he stabbed the deceased because he was so scared. E R1 also cannot remember most of the accounts of what materially happened during the fight. R1 admitted that he stabbed the deceased using a knife exh. P25A only due to the fact that the deceased had tried to slash him using a parang and for that, he did not have any intention to kill the deceased.

[36] As for R2, he denied committing the offence of murder on the F deceased in his defence. On the fateful day, he just caught hold of the deceased to help the R1 defend himself from the deceased. He did not use the parang to cut the deceased's ankle, as stated by the eyewitnesses but instead, the deceased cut his own ankle after he kicked the parang held by R2. Other than that, most of the answers given by R2 in his testimony were G either that he did not know what to say or had nothing to say about the fateful incident.

[37] In light of the aforestated facts, we will examine whether it could be said that the respondents assaulted the deceased in the exercise of their right of private defence. To begin with, it is well-settled law that the burden of H establishing the plea of private defence is on the accused but it is not as onerous as the one that lies on the prosecution throughout the case. While the prosecution is required to prove its case beyond a reasonable doubt, the accused need only to discharge the onus on the balance of probabilities that they have acted well within the parameter of the plea of private defence. See Federal Court's decision in *Patrick Chau Fook Henn*'s case.

I

[38] In order to find out whether the right of private defence is available in favour of the respondents, we have to analyse and determine the compliance of the pre-conditions and the conditions as stipulated under the law. As to the pre-condition, we are of the view that the respondents successfully fulfilled the first and third requirements. The respondents have shown that an offence affecting the human body was being committed by the deceased against R1 when the deceased took out his parang from the sheath to slash R1 during the fight. The set of circumstances that had happened justifies the first pre-condition as required under para. 97(a) of the PC. For the third pre-condition, we are also of the view that the respondents passed the justification required under para. 100(a) of the PC, that is, to show that the action taken by the deceased may reasonably cause the apprehension that death will otherwise be the consequence of such action. Again, the deceased's action in taking out his parang from the sheath to slash R1 during the fight, reasonably justifies the apprehension of death to the respondents.

[39] As for the second pre-condition, sub-s. 99(3) of the PC requires that if there is time to have recourse to the protection of the public authorities, the right of private defence does not bite. Here, we have to analyse the situation objectively. Based on the established facts surfaced from the evidence adduced either by the prosecution or the defence, it shows that when the deceased took out his parang from the sheath tied up on his waist, R2, who was standing behind the deceased managed to seize hold of the parang and at the same time, he managed to hold the deceased from behind. In such a situation, the parang was no longer in the possession of the deceased and R1 or even R2, could run away and have time or opportunity to have recourse to the protection of the public authorities or at least try to get help from the residents at Rumah Panjang Lasit which is not far from the crime scene. Based on that peculiar situation, we are of the considered view that the respondents failed to fulfil the third pre-condition under sub-s. 99(3) of the PC.

[40] Then, we move on to the conditions to be fulfilled by the respondents in order to succeed in raising private defence. For the first condition, sub-s. 99(4) of the PC stipulates that the force used in the exercise of private defence should not extend to the inflicting of more harm than it is necessary. As indicated in the earlier finding, it is an undisputed fact that when R1 stabbed the deceased using a knife exh. P25A, R2 had already seized the parang from the deceased. Furthermore, at that particular moment, R2 managed to hold the deceased from behind. It means that, at the time R1 stabbed the deceased, it was impossible for the deceased to inflict any bodily injury to R1 or R2 using the parang since the parang was no longer in the deceased's possession. Upon successfully retrieving the parang from the deceased, there is no need for R1 to inflict injury by stabbing the deceased repeatedly. Certainly, in such a situation, R1, with the help of R2, inflicted

more harm than it is necessary on the deceased. In short, the respondents had exceeded their right of private defence. Thus, we find that the respondents failed to satisfy the condition set out in sub-s. 99(4) of the PC.

[41] Finally, the second condition stipulated under s. 102 of the PC is that the right to private defence continues as long as such apprehension of danger to the body continues. Again, the undisputed facts that show R1 stabbed the deceased after R2 had seized the parang from the deceased, and at the same time, R2 held the deceased from behind are pertinent. In light of those facts, it is obvious that such apprehension of danger of bodily injury to R1 and R2 had subsided or ceased in existence. By stabbing the deceased when there is no longer such apprehension of danger to the body, clearly, R1 with the help of R2, had acted beyond the parameter of the right of private defence. In other words, when there is no risk of death, it is unjustified for the respondents to inflict death on the deceased in the guise of the private defence. Therefore, the respondents could not rely on the right of private defence based on the condition set under s. 102 of the PC.

[42] To conclude, the right of private defence is codified in ss. 96 to 106 of the PC. All these sections will have to be read together to ascertain whether, from the facts and circumstances of the case, the respondents are entitled to the right of private defence or have exceeded the said right. Only when all these sections are read together, we get a comprehensive view of the scope and limitations of the said right. From our analysis and deliberation on the material facts of the case in these appeals, and upon considering the pre-conditions and conditions set by the law on private defence, we find that on the balance of probability, the respondents failed to show that they have the right to rely on the right of private defence. Therefore, we answer the first issue in negative.

Second Issue: Whether The Charge Is Defective

[43] The LHCJ made the following finding at the end of his grounds of decision at para. 61:

> In the light of the above, I find that the charge preferred against the 1st and 2nd Accused is defective as it did not give the 1st and 2nd Accused, sufficient clarity and certainty as to what they were being charged for. Further the 1st and 2nd Accused were being misled into believing that they were alleged to have committed the said offence as per the Charge, Consent to Prosecute and the Prosecution's Opening Speech, that the offence was committed on the 19.03.2017. The evidence adduced by the Prosecution in actual fact contradicted the charge preferred by the Prosecution against both the 1st and 2nd Accused.

[44] Before us, learned counsel for the respondents submitted that the LHCJ was correct in his finding that the charge preferred against the respondents was defective. The documentary evidence marked as exh. A for

the 'consent to prosecute', exh. B for the 'charge' and exh. C for the 'prosecution's opening speech' clearly shows that the fateful incident happened between 12.30am to 3.30am on 19 March 2017. On the contrary, the evidence shows that it happened early in the morning on 15 March 2017. No amendment was made to the charge in exh. B as to the correct date of the fateful incident. Therefore, the respondents were not given sufficient clarity and certainty as to what they were being charged.

[45] Learned DPP argued otherwise. It was submitted that the oral application to amend the date from 19 March 2017 to 15 March 2017 in exhs. A, B and C was granted by the LHCJ on 1 October 2018 before the end of the prosecution's case. Both counsels for the respondents were well aware to the same and no objection was raised on the amendment's application. Therefore, the respondents could not have been misled by the prosecution regarding the date of the offence. The date as stated in exhs. A, B and C were in actual fact have being amended by the court upon oral application made by the prosecution.

[46] Having sieved and examined the notes of evidence in the appeal records, we find substance in the DPP's argument. The notes of evidence at pp. 170 and 171 in encl. 21 – record of appeal vol. 2, clearly stated as follows:

DPP	Before I proceed, the prosecution just realized that there was a clerical error the date on the offence. It should be on 15th of March, 2017 instead of 19th of March, 2017 as stated in Consent to Prosecute (Exhibit A) and Charge preferred against the accused person (Exhibit B) and the Opening Speech of the Prosecution (Exhibit C). The prosecution would like to make an oral application. First to correct the clerical error and will do the amendment later on.
Mr Rosli:	No objection.
Mr Jacob:	No objection.
Court:	Oral application to amend as stated above is granted.

Anyhow, the notes of evidence show that the oral application by the prosecution to amend the charge in exh. B together with the other two documents in exhs. A and C, by the reason that there was a clerical error over the date of the offence, was not made at the end of the prosecution case but at the earlier stage. The DPP made the application soon after PW8, the doctor who did the post-mortem, being cross-examined by learned counsel for R2. As clearly stated in the notes of evidence, the LHCJ had allowed learned DPP's oral application without any objection from learned counsels for the respondents.

[47] Based on that fact, it shows that the sole reason given by learned prosecution to amend the charge is that, there was a clerical error on the date of the offence. Then, the LHCJ himself had allowed the oral application

A without any objection from learned counsels for the respondents. The only lacking in the notes of evidence, is that, there is no written amendment done to the charge either by the prosecution or the court, and no record shows that the amendment was read to the respondents.

B **[48]** The question is, whether in the absence of the written amendment made as to the actual date of the fateful incident in the charge, would render the charge against the respondents defective and it is fatal to the prosecution's case? In answering the question, the steps taken by the prosecution, particularly to make an oral application to amend the clerical error over the date of the offence in the charge against the respondents, are relevant.

C **[49]** Basically, clerical error is an unintentional administrative or typographical error which can be explained only by considering it as a slip or mistake. On this issue, we reminded ourselves of the court's duty in ensuring that the charge must be properly framed. Basically, before the commencement of trial, the court must have regard to the provisions of D ss. 152, 153 and 154 of the Criminal Procedure Code (CPC) relating to the framing of the charge. Clearly, there is a specific duty imposed on the prosecution as mandated under sub-s. 153(1) of the CPC to particularise the charge sufficiently so as to give adequate notice to the respondents of the matter with which they are charged. See Federal Court decision in E *PP v. Raymond Chia Kim Chwee & Anor And Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260; [1985] 2 MLJ 436 at p. 439.

[50] Be that as it may, we also acknowledged that s. 156 of the CPC provides that no error either in stating the offence or the particulars required to be stated in the charge can be regarded as material unless such error in fact F misled the respondents. For ease of reference, s. 156 of the CPC provides as follows:

> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state of offence or those particulars shall be regarded, at any stage of the case, as material unless G the accused was in fact misled by such error or omission.

Then, we refer to the illustration (d) of s. 156 of the CPC, which illustrated a comprehensible example as follows:

> (d) A is charged with the murder of John Smith on the 6 June, 1910. In fact, the murdered person's name was James Smith and the date of the H murder was the 5 June, 1910. A was never charged with any murder but one, and had heard the inquiry before the Magistrate which referred exclusively to the case of James Smith. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

I

Applying the provision of the law under s. 156 and illustration (d) of the CPC to the facts of this appeal, obviously, there is only one matter to be considered by the court. The said matter is that, whether the failure of the prosecution to make the necessary written amendment to the actual date in the charge exh. B in fact misled the respondents.

[51] As already stated, the LHCJ allowed the oral application by the prosecution to amend the date of the offence in the charge preferred against the respondents on 1 October 2018 and obviously both counsels for the respondents did not put any objection. From thereon, the prosecution's case proceeded based on the fact that the alleged offence was committed on 15 March 2017. So as to the line of cross-examining of the prosecution witnesses by learned counsels for the respondents, particularly the cross-examination of PW14 and PW15. Then, at the defence stage, the way in which the defence was presented makes it obvious that they duly acknowledge the actual date of the alleged offence, and more importantly, the nature of the prosecution's case. The respondents and their counsels were well aware of the actual date of the alleged offence and not an iota of evidence shows otherwise. Thus, we are satisfied that the respondents were in no way misled or prejudiced by the failure of the prosecution to make the necessary written amendment to the actual date in the charge exh. B. See our decision in *Msimanga Lesaly v. PP* [2005] 1 CLJ 398; [2005] 4 MLJ 314 in para. 5 at p. 319, where it was held that the minor defects in the charge did not mislead or prejudice the appellant.

[52] Related to the same point, we are also of the view that there is no miscarriage of justice that would result from a technically incorrect date of the offence in the charge due to the clerical error. Even if the prosecution failed to make an application to amend the charge, we still find that the error is curable under s. 422 of the CPC, which provides as follows:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[53] Thus, we conclude that the LHCJ failed to apply the correct proposition of the law in dealing with the second issue. The prosecution did apply and the LHCJ allowed the amendment as to the date of the alleged

offence without any objection from the respondents. Based on the peculiar facts of the case in these appeals, the failure of the prosecution to make a written amendment to date in the charge exh. B could not mislead or prejudice neither could it lead to a miscarriage of justice to the respondents. We are of the considered view that the charge preferred against the respondents is not defective. Thus, we also answer the second issue in negative.

Conclusion

[54] In the circumstances, and for the reasons we have given, we were of the view that there were merits in the PP's appeals. At the end of the defence case, the LHCJ should have found that the prosecution had proved the case beyond reasonable doubt against the respondents on the charge of murder under s. 302 of the PC since the respondents failed on the balance of probability in their plea of private defence. Furthermore, the charge preferred against the respondents is not defective. Hence, we unanimously allowed the PP's appeal. We quashed the High Court's acquittal order and convicted both R1 and R2 of murder under s. 302 of the PC.

[55] In sentencing the respondents, we take into account the fact that they were remanded while waiting for the trial to conclude. From the records, they were arrested on 23 March 2017 and then released upon the High Court order of discharge on 18 August 2020. In the circumstances of the case, we impose imprisonment of 30 years from the date of sentencing and whipping of 12 strokes of rattan on each of the respondents.